

9 FAM 41.59 Notes

(TL:VISA-437; 07-10-2002)

9 FAM 41.59 N1 Background

(TL:VISA-323; 10-10-2001)

a. On December 17, 1992, the Presidents of the United States and Mexico, and the Prime Minister of Canada entered into the North American Free Trade Agreement (NAFTA). Implementation of this agreement has been provided for by the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Pub. L. 103-182. The NAFTA Implementation Act was signed into law by the President of the United States on December 8, 1993. The NAFTA entered into force on January 1, 1994.

b. Chapter 16 of NAFTA, entitled "Temporary Entry for Business Persons" was designed to facilitate the movement of businesspersons among the United States, Canada, and Mexico. This chapter contains the visa-related provisions relating to the temporary entry of businesspersons. NAFTA allows investment, trade, and professional commerce services to take place, and thus affects four nonimmigrant visa categories in the U.S. Immigration and Nationality Act: Temporary visitors for business (B-1); treaty trader and investors (E); intra-company transferees (L) and NAFTA professionals (TN).

c. The U.S.-Canada Free Trade Agreement (US-CFTA) created a class of professional nonimmigrants, (TC), but did not provide authority for visa issuance. NAFTA has modified and adopted the TC professional category and treats this new admission category (TN) as if it were a nonimmigrant visa classification under INA 101(a)(15), thus, authorizing the issuance of visas to both Mexicans and Canadians. The CFTA was suspended when NAFTA entered into force. The TN category should not be confused with the H-1B visa classification. It is a separate and distinct category. Similarities do exist, however, since this category was derived from the H-1B classification.

9 FAM 41.59 N2 Countries That Benefit from Agreement

(TL:VISA-323; 10-10-2001)

Only citizens of the NAFTA parties (Canada, Mexico and the United States) may benefit from the agreement. Permanent resident status in any NAFTA party country does not in itself confer any benefits under this chapter of the agreement.

9 FAM 41.59 N3 NAFTA Professional Requirements

9 FAM 41.59 N3.1 Qualified as Professional

(TL:VISA-323; 10-10-2001)

a. This category extends visa classification only to NAFTA citizens who are members of a profession listed in Appendix 1603.D.1 of NAFTA, Chapter 16.

b. The alien must meet the specific requirements, education and/or experience, etc. listed in the Annex related to that particular profession. While the list originally included professional activities included under the former H-1 standards as professions, it has been extended to include additional professions. However, with rare exception each profession requires a baccalaureate degree as an entry-level requirement. If a baccalaureate is indeed required, experience can **NOT** be substituted for that degree. In some professions, alternative criteria to a bachelor's degree is listed, and sometimes experience and criteria are required in addition to the degree. The list is occasionally expanded upon agreement of all NAFTA parties.

9 FAM 41.59 N3.2 Employment Required

(TL:VISA-323; 10-10-2001)

The alien must have a U.S. employer. Self-employment is not an option under the category. If the alien seeks self-employment, the alien should pursue that business under the treaty trader or investor visa classification, or another visa category. Evidence of employment by a U.S. employer is necessary to accord "TN" classification.

9 FAM 41.59 N4 Entry Documentation

9 FAM 41.59 N4.1 Canadian Citizens

(TL:VISA-323; 10-10-2001)

Since Canadian citizens, unlike Mexican citizens, are not obliged to be in possession of a nonimmigrant visa to enter the United States, (except in the E and K categories), the issuance of a TN or TD visa should be rare. Consular officers should remember, however, that although Canadians don't need visas, they may, and should be issued to qualified applicants upon request. Canadian citizens seeking entry as a NAFTA professional must present the following documentation:

- (1) Proof of Canadian citizenship;

(2) Evidence of an offer of employment in one of the professional occupations which requires the education and/or experience listed; [Appendix 1603.D.1];

(3) Evidence of education and/or work experience set forth in Appendix 1603.D.1; and

(4) Evidence of compliance with licensing requirements.

9 FAM 41.59 N.4.2 Mexican Citizens

(TL:VISA-323; 10-10-2001)

A Mexican citizen seeking TN status must be the beneficiary of an approved I-129 petition, comparable to those of H, L, O, P, or Q visa applicants. The validity of the visa should coincide with that of the petition or reciprocity schedule, whichever is less. The Mexican applicant seeking admission to the U.S. must present the following documentation:

(1) Proof of Mexican citizenship;

(2) A valid nonimmigrant TN visa;

(3) An approved I-129 petition according TN status;

(4) Evidence of an offer of employment in one of the listed professional occupations requiring the education and/or experience listed in [See Appendix 1603.D.1];

(5) Evidence of education and/or work experience set forth in Appendix 1603.D.1]; and

(6) Evidence of compliance with licensing requirements.

9 FAM 41.59 N5 Temporary Entry

(TL:VISA-323; 10-10-2001)

The Agreement encompasses only businesspersons coming to the U.S. temporarily. Chapter 16 provides the following definition: "Temporary Entry means an entry into the United States without the intent to establish permanent residence." The Department's regulation [22 CFR 41.59(c)] amplifies this definition to provide additional guidance. The essence of the requirement is that the alien is seeking "temporary" entry into the U.S. The alien, therefore, must satisfy the consular officer that the proposed stay is

temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment.

An intent to immigrate in the future which is in no way connected to the proposed immediate trip need not in itself result in a finding that the immediate trip is not temporary. An extended stay, even in terms of years, may be temporary, as long as there is no immediate intent to immigrate.

9 FAM 41.59 N6 Evidence of Professional Employment

(TL:VISA-323; 10-10-2001)

The applicant must present evidence sufficient to satisfy the immigration officer of intent to engage in business activities for a U.S. employer(s) or entity(ies) at a professional level. This evidence may be in the form of an employment letter or contract outlining the business activities which the individual will be engaged in, and should state the following:

- (1) Activity in which the alien shall be engaged;
- (2) Purpose of entry;
- (3) Anticipated length of stay;
- (4) Educational qualifications or appropriate credentials demonstrating professional status;
- (5) Evidence of compliance with INS regulations, state laws, and/or licensing requirements; and
- (6) Arrangements for remuneration.

9 FAM 41.59 N6.1 Education and/or Experience Requirement

(TL:VISA-323; 10-10-2001)

a. Education: The applicant's employer must submit evidence that the beneficiary meets the minimum education requirements or has the alternative credentials set forth in Appendix 1603.D.1 of Chapter 16 of the NAFTA Agreement. Evidence of professional qualifications may be in the form of degrees, certificates, diplomas, professional licenses, or membership in a professional organization. Degrees, diploma, or certificates received from an educational institution outside the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service specializing in evaluating foreign documentation.

b. Experience: Evidence attesting to the applicant's experience should be in the form of letters from former employees. If the beneficiary was self-employed, business records should be submitted attesting to that self-employment.

9 FAM 41.59 N6.2 Licensing Requirements

(TL:VISA-323; 10-10-2001)

a. The list of professions reveals requirements for admission into the United States under immigration provisions. Such requirements may not necessarily meet licensure requirement to practice that given profession. So if an alien states that he or she will be performing that professional activity requiring a license, then the alien must demonstrate that he or she has obtained necessary license(s) to practice that profession. It is commonplace for a professional to perform professional services for his or her employer without the necessities of obtaining a license. For example, an attorney will only need a license if his or her job requires the alien to practice immediately before a court. Yet, if the job requires the provision of legal services (legal research, etc.) not subject to licensure, the alien need not demonstrate the possession of the necessary license. These are the only professions requiring a nursing license for admission purposes.

b. If a temporary license is available and the duties may be performed without a permanent license, the appropriate INS office, after an analysis of the facts, may determine that the alien is entitled to TN classification.

c. In certain professions that generally require licensure, the state may allow an individual to fully practice under the supervision of a licensed supervisor. In such instances, the appropriate INS office may determine that the alien is entitled to TN classification.

9 FAM 41.59 N6.3 Labor Condition Application (LCA) Requirement Applies

(TL:VISA-323; 10-10-2001)

Mexican citizens who seek to enter the United States as NAFTA professionals, shall be subject to the attestation requirement of INA 212(m), in the case of a registered nurse, or the application requirement of INA 212(n), in the case of all other professions.

9 FAM 41.59 N6.4 Petition Requirement (Mexican Citizens Only)

9 FAM 41.59 N6.4-1 Where to file

(TL:VISA-323; 10-10-2001)

The U.S. employer of a Mexican citizen who seeks to enter the United States as a NAFTA TN nonimmigrant must file a petition on Form I-129 with the Nebraska Service Center. This is the **ONLY** Service Center designated to accept petitions seeking TN classification.

9 FAM 41.59 N6.5 Supporting Documentation

(TL:VISA-323; 10-10-2001)

A U.S. employer who seeks to employ a Mexican citizen under NAFTA provisions must present the following documentation in support of the I-129 petition:

(1) Evidence that the employer has filed with the Secretary of Labor either the Form ETA 9029 in the case of a registered nurse, or Form ETA 9035 in the case of all other NAFTA professionals;

(2) Evidence that the beneficiary meets the minimum education requirements or credential requirements set forth in Appendix 1603.D.1;

(3) Statement indicating the qualifying profession in which the beneficiary will be engaging and a detailed description of the beneficiary's regular duties; and

(4) Evidence of appropriate licensure if the beneficiary will engage in an occupation or profession for which the state or locality has set forth licensing requirements, when such jobs require licenses.

9 FAM 41.59 N6.6 Petition Validity

(TL:VISA-323; 10-10-2001)

The validity of an approved petition classifying a citizen of Mexico as a TN nonimmigrant shall be valid for a period of up to one year.

9 FAM 41.59 N6.6-1 Notification of Petition Approval

(TL:VISA-323; 10-10-2001)

INS will notify the petitioner of the approval of the petition on Form I-797, *Notice of Action*. The petitioner may furnish the form to the employee to facilitate the application for a visa or entry into the United States.

9 FAM 41.59 N6.6-2 Consular Officer's Responsibility with Respect to Petition

(TL:VISA-437; 07-10-2001)

It is the responsibility of the consular officer to review the petition, not to readjudicate it. The approval of the petition is usually prima facie evidence of the applicant's entitlement to status. Unless the petition was approved in error, the petition should only be returned if the consular officer knows, or has reason to believe, that the beneficiary is not entitled to status. In such instances, the consular officer shall, *under cover of Form DS-3096, Consular Return/Case Transfer Cover Sheet*, forward the petition, all pertinent documentation, and a written memorandum of the evidence supporting the return to the Nebraska Service Center. The memorandum should be based on the grounds necessary for the INS to revoke the petition, as shown in 9 FAM 41.59 N6.6-3. A copy of all material must be retained at post.

9 FAM 41.59 N6.6-3 Revocation of Petition

(TL:VISA-323; 10-10-2001)

a. Automatic Revocation: An unexpired petition is automatically revoked by INS if the petitioner:

- (1) Goes out of business;
- (2) Files a written withdrawal of the petition; or
- (3) Notifies INS that the beneficiary is no longer employed.

b. Revocation of Notice: A note of revocation of petition approval shall be sent to the petitioner by INS, when INS becomes aware that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
- (2) The statement of facts contained in the petition was not true and correct;
- (3) The petitioner violated the terms or conditions of the petition;
- (4) The petition violated the requirements of INA 214(e) of the regulations; or,
- (5) The petition approval violated the requirements of INA 214(e) or involved gross error.

9 FAM 41.59 N6.6-4 Numerical Limit on Mexican Petitions*(TL:VISA-323; 10-10-2001)*

Section D of Annex 1603 of NAFTA establishes a numerical limit with respect to Mexican professionals for a transition period of up to 10 years. Beginning on January 1, 1994, the date of entry into force of NAFTA, the numerical limit is set at 5,500 for TN petitions annually. The United States and Mexico may mutually agree to increase the numerical limit or eliminate it entirely prior to the ending of the ten-year period on December 31, 2003.

9 FAM 41.59 N7 Denial of E Status in Certain Labor Disputes*(TL:VISA-323; 10-10-2001)*

A citizen of Canada or Mexico may be denied E treaty trader or treaty investor status as described in section 101(a)(15)(E) and section B of Annex 1603 of the NAFTA if:

(1) The Secretary of Labor certifies to, or otherwise informs the Commissioner, that a strike or other labor dispute involving a work stoppage of workers in the alien's occupational classification is in progress at the place where the alien is, or intends to be employed.

(2) Temporary entry of that alien may affect adversely either:

(a) The settlement of any labor dispute that is in progress at the place or intended place of employment, or

(b) The employment of any person who is involved in such dispute.

9 FAM 41.59 N7.1 If Employed Alien is Participating in Strike*(TL:VISA-323; 10-10-2001)*

If the alien has already commenced employment in the United States, and is participating in a strike or other labor dispute involving a work stoppage of workers, he and/or she is not considered to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers. This holds whether or not such strike or other labor dispute has been certified by the Secretary of Labor, or whether INS has been otherwise informed that such a strike or labor dispute is in progress. The alien is subject to the following terms and conditions.

9 FAM 41.59 N7.2 Notification of Denial

(TL:VISA-323; 10-10-2001)

If it is determined that an alien shall be denied a TN visa, or is denied entry to the United States, the applicant must be notified in writing of the reason(s) for the refusal. In addition, VO/L/A must be immediately informed of such denial so that a designated representative of the applicant's home country government may be promptly notified in writing of the reason for the refusal.

9 FAM 41.59 N8 Fees

(TL:VISA-323; 10-10-2001)

INS shall assess Canadian citizens entering the U.S. as NAFTA professionals a processing fee of \$50.00. No fee shall be charged to Mexican citizens.

9 FAM 41.59 N9 Length of Stay in U.S.

(TL:VISA-323; 10-10-2001)

A Canadian or Mexican citizen seeking admission as a TN professional shall be treated as if seeking classification under INA 101(a)(15), therefore, the INA 214(b) presumption of immigrant intent applies if he fails to meet all the requirements of the TN visa category. The maximum period of admission of a TN is one year. The admission period of a dependent (TD) shall coincide with the TN principal's. (See 9 FAM 41.59 N5 for definition of "temporary").

9 FAM 41.59 N10 Part-time Employment

(TL:VISA-323; 10-10-2001)

An alien entering the U.S. in TN status may be employed on a part-time basis.

9 FAM 41.59 N11 Changing or Adding Employers

(TL:VISA-323; 10-10-2001)

Aliens in TN status may change or add employers while in the United States by filing Form I-129 with the Northern Service Center. A Canadian citizen may also depart the United States and apply for reentry. He and/or she must present new documentary evidence, and the prescribed fee (\$120.00) must be remitted upon admission.

9 FAM 41.59 N11.1 Spouses and Minor Children

(TL:VISA-323; 10-10-2001)

a. Spouses and minor, unmarried children who are accompanying or following to join TN professionals, may be admitted to the United States in the TD classification. Dependents are not permitted to accept employment in the U.S. while in TD status. They are, however, permitted to attend school on a full-time basis. The INS does not assess a processing fee on dependents. As with any derivative status, TD applicants must demonstrate a bona fide spousal or parent-child relationship to a TN status holder.

b. Canadians should be able to show a valid I-94 authorizing their TN status. Aliens normally exempt from visa requirements need not obtain visas.

9 FAM 41.59 N12 Validity of Visas for TN Family Members**9 FAM 41.59 N12.1 Mexican or Canadian Family Members**

(TL:VISA-323; 10-10-2001)

Family members possessing either Mexican or Canadian citizenship should be issued multiple entry visas valid for the maximum period authorized by Appendix C) or for the length of the principal alien's visa and/or authorized period of stay, whichever is less. [See 9 FAM Appendix C for fees.]

9 FAM 41.59 N12.2 TCN Family Members Not Possessing Mexican or Canadian Citizenship

(TL:VISA-323; 10-10-2001)

Non-Canadian or non-Mexican family members of TN status holders are entitled to TD visas, which can be issued in non-Canadian or non-Mexican passports. However, only the Canadian and Mexican reciprocity schedules in Appendix C provide data for TN and TD visas. Therefore, the number of entries, fees and validity for non-Canadian or non-Mexican family members of a TN status holder seeking TD visas should be based on the reciprocity schedule of the TN principal alien. For example, a Chinese national married to a Canadian would be issued a TD visa in his and/or her Chinese passport based on the Canadian reciprocity schedule. In this case the applicant would be the recipient of a visa valid for multiple entries, no fee. However, a Mexican married to a Canadian would be issued a TD visa in his and/or her Mexican passport valid for multiple entries with a fee of \$100.00 based on the Mexican reciprocity schedule.

9 FAM 41.59 N12.3 Domestic Servants of TNs

(TL:VISA-434; 07-08-2002)

A domestic servant of a TN who meets the requirements set forth at 9 FAM 41.31 N6.3-3 may be issued a B-1 visa.

9 FAM 41.59 N12.4 Canadians Requiring TN Visas

(TL:VISA-323; 10-10-2001)

In rare cases, posts may need to issue a TN visa to a Canadian. For example, a Canadian without TN status, who resides in a third country with a non-Canadian spouse or family members, and who plans to enter the U.S. as a NAFTA professional simultaneously with the family member(s) will need a TN visa in order to confer derivative (TD) status on his and/or her dependents. In such cases, the Canadian could not wait to have his and/or her case adjudicated by INS at a port of entry, since the non-Canadian dependent would require a visa to board a flight and to apply for entry into the U.S.

9 FAM 41.59 N13 Canadians to Establish That Requirements of NAFTA Met

(TL:VISA-323; 10-10-2001)

Since Canadians will not have any sort of petition establishing a claim to TN status, the consular officer will have to determine that the requirements of NAFTA have been met. To do so, the applicant must be able to document the following:

(1) Proof of Canadian Citizenship: Typically, this would be a Canadian passport, but a passport is only required of Canadians seeking entry to the United States from outside the Western Hemisphere. While most Canadians traveling outside North America carry passports, a post could encounter a legitimate Canadian traveler not in possession of one. In such cases, secondary evidence of citizenship would have to suffice.

(2) Documentation Demonstrating Engagement in Business Activities at a Professional Level: The applicant's profession must be listed in Appendix 1603.D.1 of NAFTA. Documentation should normally be in the form of a letter from a prospective employer or entity in the U.S. describing the applicant's professional activities. Such activities must require an employee with the minimum credential listed for that profession in the NAFTA appendix. The letter should address the anticipated length of stay and salary of the NAFTA professional.

(3) The Educational Qualifications or Appropriate Credentials that Demonstrate Professional Level Status. Exhibit II, cited above, describes the credentials (diplomas, degrees, licenses, etc.) necessary to qualify.

(4) Evidence that the applicant complies with any state or local laws and/or licensing requirements for the professional activity in which he and/or she will be engaged, if required by that position.

9 FAM 41.59 N14 Aliens Subject to INA 212(e)

(TL:VISA-323; 10-10-2001)

The two-year home residency requirement for some former J-1 holders applies only to immigrant visa applicants, and to H and L nonimmigrant visa applicants. Thus, TN applicants and their TD family members who are former exchange visitors subject to INA 212(e) are not prohibited from receiving visas and entering the U.S. as NAFTA professionals, even if their professional activities might be similar or identical to those of an H or L recipient.

9 FAM 41.59 N15 Denial of Treaty Trader or Treaty Investor Status to Canadians or Mexicans in Certain Labor Disputes

(TL:VISA-323; 10-10-2001)

[See 8 CFR 214.2(e)(22).]